NO. 47012-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMASON CHRISTOPHER TEDDER,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Rules

I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Tedder's convictions and sentence should be affirmed because:

(1) He fails to demonstrate that his attorney was ineffective when he chose not to object to testimony that was admissible under the rules of evidence;

(2) He waived his claim of prosecutorial misconduct when he did not object during the prosecutor's closing argument;

(3) The trial court did not err in calculating his offender score;

(4) He waived his right to challenge the imposition of his legal financial obligations when he did not object to them at the time of sentencing; and

(5) He waived his right to challenge the jury instructions when he did not object to them at trial.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

A. Was Tedder's attorney ineffective when he did not object to testimony that was admissible under the rules of evidence?

B. Did Tedder waive his claim of prosecutorial misconduct when he did not object to reasonable inferences argued by the prosecutor during her closing argument?

C. Did the trial court err in calculating Tedder's offender score by agreeing with Tedder that his harassment conviction was not the same criminal conduct as his assault conviction?

D. Has Tedder waived his right to challenge the imposition of legal financial obligations on appeal, when he did not objection to their imposition at the time of sentencing?

E. Did Tedder waive his right to challenge the jury instruction defining reasonable doubt when he did not object at trial?

III. STATEMENT OF THE CASE

Dolly Sage was in a dating relationship with Jamason Tedder. RP at 77-78. They lived together in an apartment on Commerce Street in Longview. RP at 78. The only access to the apartment was through the front door and a window in the living room. RP at 80. On the evening of Friday, February 21, 2014, Sage and Tedder were both in their apartment. RP at 81. Sage exited the bathroom and observed Tedder holding all three of her cell phones in his hands. RP at 81-82. Tedder had a cold and scary look on his face and was upset. RP at 82-82.

Tedder began to interrogate Sage about "every picture, every message, every everything" on her phone. RP at 82. Tedder was especially concerned with Sage's ex-boyfriend, Oden, and questioned her about messages, phone calls, and pictures of Oden. RP at 82. Tedder wanted answers about "every picture and every message that [Sage] had to anybody else." Tedder told Sage she could not leave unless she answered him. RP at 83. Tedder told Sage that if she tried to leave he would kill her. RP at 83. Tedder's tone of voice was scary. RP at 83. Sage believed he would kill her and began crying. RP at 83.

As Tedder interrogated Sage, he grabbed her arm behind her back, forced her to the ground with his knee, and smashed her face to the wood floor. RP at 84. Tedder held Sage's head to the floor with his knee. RP at 84. Sage's forehead and entire body were in pain. RP at 84. She was afraid. RP at 85. Tedder demanded that Sage tell her why she had a picture of her and Oden on her phone and asked her if she did not love him anymore. RP at 85.

Tedder obtained a rusty pair of pliers that they used to turn the heater on and off. RP at 86, 87-88. He threatened to pinch Sage's fingers off with pliers and to whip her with a belt if she would not answer him. RP at 85. Tedder told Sage he could keep her there suffering for a long time. RP at 85. Sage believed Tedder's threat to be real. RP at 86. At this point, Tedder was angry and shaking. RP at 86. Using a belt, Tedder whipped the bed repeatedly, and threatened to whip Sage if she refused to answer his questions. RP at 86-87. The belt had metal studs on it. RP at 87.

Sage begged Tedder to stop. RP at 88. Hoping to escape with her life, she told him "loving, positive things." RP at 88. Sage was fearful she would die and believed she would "never leave there."[1] RP at 88. In an attempt at reverse psychology, Sage even tried begging Tedder not to

[1] While testifying about this at trial, Sage was crying. RP at 88.

kick her out, to make him believe she did not want to leave. RP at 88. The interrogation lasted for approximately six hours. RP at 88. During this entire time period Sage believed she was not free to leave. RP at 89. She believed that if she attempted to escape, Tedder would "get" her. RP at 89. Sage screamed, but not loudly, because Tedder grabbed her mouth and told her to be quiet. RP at 90.

Tedder ordered Sage to go to sleep, and eventually she did. RP at 90. Later, he woke Sage up and began nudging her and holding a heart-shaped sucker in his hand that had been given her by a friend for Valentine's Day. RP at 90-91. The sucker bore the inscription: "To Dolly, Happy Valentine's Day, Love Jen." RP at 91. Tedder then accused Sage of being a lesbian, turned on the television, and forced Sage to watch "girl on girl porn." RP at 91.

Tedder took Sage's clothes off and had sex with her. RP at 91. Sage did not say anything or tell Tedder to stop. RP at 91. Sage did not try to push him off. RP at 91. The reason Sage did not resist was because she was worried that if she did Tedder would hurt her. RP at 92. Because Sage did not feel she have the option of not having sex with Tedder, she later described the encounter as having been "raped." RP at 91-92.

After they had sex, Tedder sat on top of Sage and told her he was "God." RP at 92. Tedder had a sharp half of a broken CD in his hand.

RP at 92, 94. Tedder threatened to gouge Sage's eyes out with it and also threatened cut her "nipples" off and her "clit." RP at 92. As he threatened her, Tedder held the broken CD right next to her face. RP at 93. Tedder threated to chop Sage up and put her in a garbage bag and said "nobody would ever know." RP at 94. Sage believed him. RP at 94. Tedder told Sage that he was "God" and that he was forcing her to confess her sins and beg forgiveness.[2] RP at 92. To appease Tedder, Sage confessed. RP at 94. Sage continued to tell Tedder she loved him. RP at 95. Tedder had sex with Sage again. RP at 97.

Tedder told Sage he had been a Navy Seal, indicating he had knowledge of torture. RP at 95. He told her that she was lucky that "they didn't allow them to put cloth in your throat and drip water down it anymore because otherwise [she] would be suffering more." RP at 95. This interrogation lasted a couple of hours. RP at 95. Eventually, having been satisfied with Sage's answers, Tedder let Sage up. RP at 95. Tedder apologized. RP at 96. Sage told him she understood that he was "doing it just to better [their] relationship." RP at 96.

For a week, Tedder would not let Sage take a shower. RP at 96. He offered to allow her to take a bath, but she declined, fearing he would drown her. RP at 96. During this week, Tedder would drag Sage across

[2] At this point in her testimony Sage again cried. RP at 92.

the wood floor by her hair. RP at 96. Sage's hair was long, and because she was unable to wash it, it became so matted that she had it cut off afterwards. RP at 96-97, 118. Losing her hair saddened Sage. RP at 97. Sage also had bruising and her head was sore for weeks after. RP at 97. During this week, Tedder had sex with Sage one additional time. RP at 97-98. Sage's belief was that on each of the three instances where they had sex, Tedder raped her. RP at 97-98.

At around 8:00 p.m. one night during the time Sage was under Tedder's control, Tedder walked Sage to Safeway. RP at 99-100. Tedder held Sage's hand the entire walk. RP at 99. On the way to Safeway, they passed the Longview Police Department. RP at 99-100. Sage did not see any police, fearing she could not escape Tedder she made no attempt to get away. RP at 100. At Safeway, they purchased doughnuts and baby aspirin. RP at 100. Sage wanted the aspirin because she was beaten up and her head was hurting. RP at 100.

On Wednesday, February 26, 2014, Tedder left the apartment to obtain a food box at the Salvation Army. RP at 101. However, fearing that she would not successfully escape, and lacking strength, Sage did not attempt to leave. RP at 101-02. Tedder was gone for roughly 30 minutes. RP at 102.

On Friday, February 28, 2014, Tedder again left the apartment. RP at 102. Before he left, Sage promised she would not leave and feigned not wanting to leave by begging Tedder not to kick her out in an effort to make him believe she would not flee while he was gone. RP at 104. However, after Tedder left, Sage believed that if she did not leave she would never get away. RP at 102. Unable to find her shoes, Sage exited the apartment barefoot and ran to her friend Penny McNeil's house on the 1300 block of Tenth Avenue in Longview. RP at 103, 106.

Upon reaching McNeil's house, Sage was distraught and crying. RP at 114. Sage was extremely upset, crying, and shaking as she told McNeil about what Tedder had done to her. RP at 115, 116. Because Sage was crying and breathing real hard, McNeil provided Sage with a pen and paper and asked her to write down what she was saying. RP at 115.

The next morning, on March 1, 2014, Sage sent a text message to Gary Gray telling her about what happened and how she was feeling. RP at 116-17. She told Gray she was "freaked out." Rp at 117. Gray took Sage to the police. RP at 118-19. When she reported what occurred to the police, as a result of the traumatic event with Tedder, Sage was in a very emotional state, "[v]ery, very upset" and "[d]istraught." RP at 119. Sage was taken to the hospital where she saw a sexual assault nurse. RP at 120.

Still shaking and extremely upset, Sage told the nurse about what happened. RP at 120.

Tedder was charged with domestic violence crimes of assault in the second degree, felony harassment, and unlawful imprisonment. CP at 1-3. After a three-day jury trial, he was found guilty as charged. RP at 484. At sentencing, the prosecutor argued that the three offenses should not be treated as same criminal conduct, therefore each offense would count toward the offender score of each of the other two offenses.[3] RP at 489. Tedder agreed with the State that the assault and harassment convictions were not same criminal conduct. RP at 495-96. However, Tedder argued that each of these offenses were same criminal conduct in relation to the unlawful imprisonment conviction. RP at 495. On this basis, Tedder argued that his offender score was two on both the assault and harassment convictions and zero on the unlawful imprisonment conviction. RP at 496. Tedder argued that his range on the assault conviction was 12 to 14 months, his range on harassment was four to 12 months, and his range on unlawful imprisonment was one to three months. RP at 497. The court agreed with Tedder and sentenced accordingly. RP at 499, 504-05.

[3] This would have resulted in an offender score of four on each of the convictions due to each two-point multiplier for a domestic violence offense.

IV. ARGUMENT

A. Tedder's attorney was not ineffective when he chose not to object to testimony that was admissible under the rules of evidence.

Tedder's attorney was not ineffective when he chose not to object to admissible testimony during the trial. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (*citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first,

considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (*citing State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173.

"[T]here is no ineffectiveness if a challenge to the admissibility of evidence would have failed[.]" *State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (citing *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006)). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has "wide latitude in making tactical decisions." *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). "Such decisions,

though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *See Nichols*, 161 Wn.2d at 14-15 With regard to the second prong of the *Strickland* test: "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To show that a failure to object caused counsel to be ineffective the defendant has the burden of showing that "not objecting fell below prevailing professional norms, that the proposed objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Courts presume that "the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn.App.

1, 20, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn.App. at 763.

Tedder's claims of ineffective assistance are all based on claims that his attorney failed to object. Thus, the above stated standard of review applies. Because the evidence was admissible Tedder cannot show that the decisions not to object fell below prevailing professional norms, nor that these objections would have been sustained. Additionally, he cannot show that had the evidence not been admitted, it was so central to the State's case that the outcome of the trial would have been different. For this reason he fails to show he suffered any prejudice.

1. Tedder's attorney was not ineffective when he did not object to testimony from the victim that while she was Tedder's prisoner she consented to sex out of fear and characterized the sex as rape.

Tedder's attorney was not ineffective when he did not object to Sage's testimony that while she was his prisoner she agreed to have sex with Tedder to avoid making him angry and referred to the sex as "rape." "The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that

evidence of other crimes is inadmissible because it only tends to show the defendant's bad character." *State v. Tharp*, 27 Wn.App. 198, 205, 616 P.2d 693, *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). When Sage testified that during her time as Tedder's prisoner she had sex with him to avoid making him angry, this evidence was relevant to showing that Tedder substantially interfered with her liberty. As such, it was part of the crime charged, was relevant, admissible, and not subject to an ER 404(b) analysis.

"In addition to the exceptions identified in ER 404(b), our courts have previously recognized a 'res gestae' or 'same transaction' exception, in which 'evidence of other crimes is admissible to complete the story of the crime on trial by proving its immediate context of happenings in time and place.'" *State v. Lane*, 125 Wn.2d 825, 833, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). "Where another offense constitutes 'a link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in 'order that a complete picture be depicted for the jury.'" *State v. Hughes*, 118 Wn.App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) *cert. denied*, 532 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d322 (1998)). In *State v. Tharp*, the court explained:

> Our courts have previously recognized the so-called "handiwork" exception, *State v. Irving*, 24 Wn.App. 370, 601 P.2d 954 (1979), and an exception for criminal acts which are part of the whole deed, *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971). An exception is also recognized for evidence that is relevant and necessary to prove an essential element of the crime charged. *State v. Mack*, 80 Wn.2d 19, 490 P.2d 1303 (1971).

27 Wn.App. at 204.

In *State v. Mott*, 74 Wn.2d 804, 806, 447 P.2d 85 (1968), the court dealt with the issue of the admissibility of evidence of other wrongs when it was essential to proving a crime that was charged. Mott was convicted of grand larceny by receiving stolen goods. *Id.* at 804. To prove this crime, the State was required to show that Mott had known the goods were stolen. *Id.* at 805. At trial, the court permitted evidence that Mott had participated in previous thefts of telephone wire from the same owner. *Id.* Mott argued that the trial court erred by permitting this evidence to prove knowledge that the goods were stolen. *Id.* The Supreme Court found that this evidence was admissible to prove intent, accident or mistake, as well as a common scheme or plan. *Id.* at 806. The Court then stated: "[B]ut even if it had no value in proving any of these things it was admissible. The test of admissibility is whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *Id.* (citing *State v. Miles*, 73 Wn.2d 65, 436 P.2d 198 (1968);

State v. Dinges, 48 Wn.2d 152, 292 P.2d 361 (1956); *State v. Hartwig*, 45 Wn.2d 76, 273 P.2d 482 (1954). The evidence of the other offenses was necessary to prove Mott knew the wire in question was stolen, and was therefore relevant to that question. *Id.* Because Mott's guilty knowledge was an "essential element of the crime which it was incumbent on the state to prove," the evidence was admissible. *Id.*

Here, to prove the crime of unlawful imprisonment, the State was required to show that Tedder substantially interfered with Sage's liberty. Prior to engaging in sex with Sage, Tedder had threatened to kill her if she tried to leave. RP at 83. He assaulted her by forcing her to the ground and holding her down. RP at 84. He threatened to pinch her fingers off with pliers, and threatened to whip her with a belt. RP at 86-87. When she did try to scream, he grabbed her mouth and told her to be quiet. RP at 90. He ordered her to sleep, awakened her, and then forced her to watch lesbian porn. RP at 90-91. He then removed her clothes and had sex with her. RP at 91. Sage testified that she was afraid to resist because she was worried he would hurt her. RP at 92. After this, Tedder sat on top of Sage, threatened her with the broken CD, and threatened to chop her up and put her in a garbage bag. RP at 92-94. After he forced her to confess her "sins," he had sex with her again. RP at 97. Tedder threatened to torture her. RP at 95. Tedder dragged Sage across the floor by her hair.

RP at 96. Tedder had sex with her on additional time. RP at 97-98. At no time during this week was Sage permitted to leave the apartment by herself. Under these circumstances, evidence of Sage having sex with Tedder to avoid his wrath was relevant to showing that he substantially interfered with her liberty. Accordingly, had Tedder's attorney objected, the objection would have been overruled.

Of course, because the conduct was admissible, words describing this conduct were necessary to the admission of this evidence. Thus, the only issue with the use of the word "rape" by a woman who consented to sex out of fear is whether it was inadmissible under ER 403 as unfairly prejudicial, confusing the issues, or misleading to the jury. However, the jury was aware of what had occurred and heard testimony from Sage that she did not resist because she was worried that if she did Tedder would hurt her. RP at 92. The jury also heard how Sage was saying loving and positive things and begged him not to leave to create the opportunity for escape. RP at 88. As a result, the jury was well aware of Sage's testimony regarding how the sex occurred. The use of the word "rape" to describe sex engaged in out of fear did not create any risk of confusing the jury. It was simply a use of common colloquial language that many women would use to describe such an encounter. This would be similar to

a victim of a burglary or theft claiming to have been "robbed" even if the crime did not meet the legal elements of robbery.

Because the testimony was relevant, had Tedder's attorney objected, the objection would not have been sustained. Further, with this evidence coming in, it made little sense tactically to object to the use of the word "rape," as the jury was well aware of what was being described regardless of the term used. For this reason, there was no tactical error in choosing not to object. Also, Tedder cannot show that he suffered any prejudice. Although the testimony regarding the sex that was not resisted out of fear was relevant to showing substantial interference with liberty, it was not so central to the State's case that had it not been admitted the outcome would have been different. The jury heard testimony regarding a terrible week-long encounter involving assault with pliers, a broken CD, and threats to torture and kill Sage. Because this description of what occurred was so horrific, even absent the sex that occurred, the outcome of the trial would have been the same so long as the jury found Sage credible. The verdicts indicate that the jury did. Thus, Tedder did not suffer ineffective assistance of counsel.

2. Tedder's attorney was not ineffective when he did not object to testimony from other witnesses regarding Sage's excited utterances to them.

Tedder's attorney was not ineffective when he chose not to object to testimony regarding Sage's account of what had occurred, after the jury had already heard this evidence through Sage. ER 803(a)(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition[,]" is "not excluded by the hearsay rule." Tedder argues that statements made by Sage to the police and nurse were hearsay, and therefore his attorney was ineffective for failing to object to these statements. However, Tedder's attorney actually did object to the statement to the nurse and was overruled.[4] RP at 335. Therefore, an ineffective assistance analysis only applies to Sage's statements to the police. With regard to the statements to the police, Tedder's attorney was not ineffective for two reasons. First, the statements to the police were admissible as excited utterances, therefore an objection to these statements would not have been sustained. Second, because the jury had already heard Sage's testimony, the content of her statements had already been

[4] Because the statement was made for purposes of medical diagnosis it was not barred by the hearsay rule. ER 803(a)(4) provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

introduced into evidence. Therefore the admission of these statements through the police did not affect the outcome of the trial, and Tedder did not suffer any prejudice.

"A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event." *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008). "The determination of the first and second elements can be established by circumstantial evidence such as 'the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made.'" *State v. Rodriguez*, -- Wn.App. --, 352 P.3d 200, 207 (2015) (quoting *State v. Young*, 160 Wn.2d 799, 809-10, 161 P.3d 967 (2007)). Making this determination depends on "whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001).

Here, Sage's statements to the police were admissible as excited utterances and were therefore not subject to the hearsay rule. Obviously, a startling event occurred to Sage. It is important to remember that the startling event Sage had experienced was a week-long imprisonment that

included threats to her life, threats of torture, assault with deadly weapons, being dragged around the floor by her hair, and sex that she felt forced to consent to out of fear. The effects of such a terrifying event were sure to linger much longer than something that happened for a short time period. The statements were made while Sage remained under the stress or excitement of the event. When speaking with Officer Wells, Sage was "terrified, it was a situation where she would stop midsentence, talk about it, stop and she again just appeared terrified." RP at 208. When speaking with Officer Shelton, Sage's demeanor was "very emotional, she was kind of fragmented, very distraught." RP at 250. And, the statements made related to the event that had occurred. For these reasons, the statements to the officers were admissible as excited utterances, and Sage's attorney was not ineffective when he chose not to object.

Further, the admission of these statements did not cause Sage to suffer any prejudice. Because the jury had already heard what had occurred through Sage, her statements to the police did not add any evidence that did not already hinge on her credibility. Thus, the statements were not so central to the State's case that had they not been admitted the outcome of the trial would have been different. Accordingly, Tedder suffered no prejudice as a result of the jury hearing admissible evidence that it was already aware of.

B. Because Tedder did not object to the prosecutor's closing argument his claim of prosecutorial misconduct is waived.

Because Tedder did not object to the prosecutor's argument, his claim of prosecutorial misconduct was waived. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)) Tedder argues that the prosecutor "fabricated" statements during closing argument and that she "minimized and misstated" the burden of proof. Neither of these claims are correct. Moreover, nothing the prosecutor argued was so flagrant and ill-intentioned that it evinced a resulting prejudice that could not have been cured with a jury instruction.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wash.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the

case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it.

Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 704 (2012). Under this heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context

of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

1. Tedder waived his claim of prosecutorial misconduct by not objecting to arguments of the prosecutor that he claims were fabricated.

Tedder's claims that the prosecutor fabricated statements by Mr. Tedder is false; the prosecutor argued reasonable inferences based on the evidence that was admitted at trial. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Tedder claims the prosecutor committed misconduct during closing argument by attributing statements to Tedder and claiming Tedder had sex with Sage against her will. During closing argument, Tedder's attorney did not object. Thus, the above-stated standard of review applies. Because the prosecutor's closing argument was proper, Tedder cannot show misconduct occurred, that a curative instruction would not have obviated prejudice, or that misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict.

"In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). The State is entitled to comment on the quality and quantity of evidence presented by the defense and such an argument does not necessarily suggest the burden of proof rests with the defense. *Gregory*, 158 Wn.2d at 860 (citing as an example *People v. Boyette*, 29 Cal.4th 381, 127 Cal.Rptr.2d 544, 58 P.3d 391, 425 (2002) (holding in a capital case that argument commenting on the lack of corroboration for the defendant's story did not shift the burden of proof)). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984))

Here, considered in context, the prosecutor drew reasonable inferences from the evidence presented at trial. The Prosecutor was referring to Tedder's actions of waking Sage up, confronting her with the sucker, accusing her of having a female lover, forcing her to watch lesbian

porn, and then having sex with her. Arguing against Tedder's assertions that Sage's act of watching the porn was voluntary and that Sage was not a captive when she engaged in sex,[5] the prosecutor argued:

> And now his explanation is, well she's into girls. And he's going to find that out, he's going to confront her with this sucker. And then he turns on the television, actually I think she says that the television was already on when he woke her up. So he's going to find that and makes her watch. And he turns her head, and she's not really fighting him she just doesn't want to. But she's not scratching him, she's not coming back and he turns her head and makes her watch. Then what does he do when she's convinced. Demonstrate for me how much you love me. Don't just say it, even though I threaten you, don't just say. I'm going to make you show it. And he has sex with her. And she doesn't fight back. And you know what? She says that's rape. Because she felt like it was rape, and she didn't have a choice.

RP at 442-43. It was reasonable for the prosecutor to argue what was being communicated to the Sage through Tedder's conduct. And, under the circumstances, it was also reasonable to argue that even though she did not fight back when Tedder had sex with her that she believed herself to have been raped because she felt she did not have a choice. Both of these arguments went to the ultimate issue of whether or not Tedder unlawfully imprisoned Sage by substantially interfering with her liberty. Because both arguments were reasonable inferences from the evidence presented at

[5] Tedder told police that Sage may have watched "girl-on-girl porn" for five to ten minutes and this was something she did sometimes. RP at 220. Tedder also told police he had sex with Sage, but denied she was being held captive. RP at 222-23.

trial, there was no misconduct. Additionally, the jury had already been instructed "to remember that the lawyer[s'] statements are not evidence" and that it "must disregard any remarks, statements, or argument that is not supported by the evidence[.]" RP at 413. Thus, even assuming the prosecutor's argument mischaracterized the evidence, there was no prejudice, because the "jury is presumed to follow the trial court's instructions." *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Moreover, Tedder's decision not to object or move for a mistrial at the time of the argument strongly suggests that it "did not appear critically prejudicial" to Tedder "in the context of the trial." *See Swan*, 114 Wn.2d at 661. Because Tedder did not object, the court did not have the opportunity to address the issue or provide a curative instruction. Further, Sage had already testified that she was forced to watch the porn, and that she believed she was raped when she did not resist sex because she feared Tedder would hurt her if she did. RP at 91-92. There was nothing contained in the prosecutor's argument as to this evidence that the jury was not already aware of. Thus, the outcome of the trial would not have been different even if the prosecutor had not made this argument. Accordingly, Tedder's claim of misconduct was waived.

2. Tedder waived his claim of prosecutorial misconduct by not objecting to the prosecutor's

rebuttal argument regarding the abiding belief language in the reasonable doubt instruction.

Tedder waived his claim of prosecutorial misconduct when he did not object to the prosecutor's statement asking the jury to consider what the evidenced told them in their "hearts, heads, and guts." Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g.*, *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . ." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)). Tedder argues that the prosecutor committed misconduct when she responded to the defense argument regarding the reasonable doubt jury instruction's "abiding belief" language. However, the prosecutor's rebuttal was invited by the defense argument, Tedder did not object to this argument at trial, and had there been any prejudice, it could easily have been cured with a curative instruction.

A similar argument to Tedder's was made in *State v. Curtiss*, 161 Wn.App. 673, 701, 250 P.3d 496 (2011), where in rebuttal the prosecutor argued: "Do you know in your gut—do you know in your heart that Renee Curtiss is guilty as an accomplice to murder? The Court of Appeals

explained that in connection with the State's argument urging the jury to render a just verdict supported by evidence, the "gut and heart rebuttal arguments in this case were arguably overly simplistic but not misconduct." *Id.* at 701-02. The court rejected Curtiss' claim that the reference to a jury's gut and heart appealed to the jury's emotion. *Id.* at 702. Further, the court explained because the jury was instructed to reach its decision "based on the facts proved" and "not on sympathy, prejudice, or personal preference" there was no prejudice from prosecutor's remark. *Id.*

Here, during his closing argument, Tedder's attorney argued:

> What's an abiding belief? That's the -- an abiding belief. We don't use that word very often, I'm not sure I've ever used it other than in a courtroom. Um, Webster says it's something that's firm, maintains over time. Um, so it's -- an abiding belief is something you have today you wouldn't wake up in three weeks and go, 'Oh man.'

RP at 458. This argument suggested that in addition to coming to a decision on a verdict during deliberations, the jurors would also need to consider the impact of their decision at a later time.[6]

[6] This argument appears to quantify the level of certainty required to satisfy beyond a reasonable doubt. Although not at issue in this appeal, it would seem to be objectionable for a defense attorney to quantify this level of certainty when it is misconduct for a prosecutor to do so. *See State v. Fuller,* 169 Wn.App. 797, 825, 282 P.3d 126 (2012), *review denied,* 176 Wn.2d 1006 (2013).

On rebuttal, the prosecutor responded by arguing:

> Counsel talk[ed] to you about an abiding belief, lasting belief. What does your head, heart, and guts say? If it says he did it, you[']r[e] convinced beyond a reasonable doubt.

RP at 470. In this context, the prosecutor was responding to Tedder's attorney's request that the jurors consider how they would feel about the verdict at a later time. Her response was appropriate in that it simply urged the jurors to consider carefully the decision they were making. Unlike in *Curtiss*, where the prosecutor asked the jury to consider what it knew only in its heart and gut, here the prosecutor also asked the jury what its "head" told it. Thus, the prosecutor did not ask the jury to divorce itself of using its head to think about the sufficiency of the evidence.

Because Tedder did not object to the argument, the court was not given the opportunity to offer a curative instruction. Considering the supposedly objectionable argument was simply a prosecutor's request for the jury to consider evidence carefully, had it been objectionable a curative instruction would have easily cured any prejudice. Further, as in *Curtiss*, the court instructed the jury to reach a decision "based on the facts proved to you and on the law given to you; not on sympathy, prejudice, or personal preference." RP at 414. Because the jury was presumed to follow this instruction, it should be presumed that any emotional appeal

from this remark did not sway the jury. Therefore, it had no impact on the outcome of the trial. Tedder's claim of misconduct was waived.

C. The trial court did not abuse its discretion when it agreed with Tedder's argument as to his offender score and sentenced accordingly.

The trial court did not abuse its discretion when it agreed with Tedder and found that the assault and harassment convictions were not same criminal conduct. "A criminal defendant's 'failure to identify a factual dispute for the trial court's resolution and ... failure to request an exercise of the court's discretion' waives the challenge to his offender score." *State v. Naillieux*, 158 Wn.App. 630, 241 P.3d 1280 (2010) (quoting *In re Pers. Restrating of Shale*, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (quoting *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000)). At sentencing, Tedder did not identify the factual dispute as to same criminal conduct that he now raises on appeal. Rather, he agreed with the State that the assault and harassment convictions were not same criminal conduct and argued for the offender score the court ultimately found. For this reason, he waived his right to challenge the trial court's finding for the first time on appeal. Furthermore, the trial court did not abuse its discretion in reaching its determination on same criminal conduct.

"While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Determinations of same criminal conduct are a matter of trial court discretion: "A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law." *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). "[T]he definition of 'same criminal conduct' is narrowly construed to disallow most assertions of same criminal conduct[.]" *State v. McGrew*, 156 Wn.App. 546, 552, 234 P.3d 268 (2010). Moreover, at sentencing, "[t]he State is entitled to rely on representations advanced by defense counsel[.]" *State v. Bergstrom*, 162 Wn.2d 87, 94, 96, 169 P.3d 816 (2007). An affirmative acknowledgement of the facts and information alleged at sentencing will relieve the State of its evidentiary obligations. *See State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

Here, at sentencing Tedder agreed with the State that his assault and harassment convictions were not same criminal conduct. Determinations of same criminal conduct are a matter of trial court discretion. The trial court, which heard the facts presented at trial, determined that these two crimes were not same criminal conduct. Because the determination of same criminal conduct is a matter of trial court discretion, Tedder waived this issue by not raising it with the trial court.[7]

Moreover, the trial court did not abuse its discretion in doing so. When Tedder assaulted Sage by means of a deadly weapon via the pliers and broken CD, he placed her in apprehension of assault with these items by holding the broken CD up to her face, and by stating he would pinch off her fingers, gouge her eyes out, and cut off her "nipples" and "clit." RP at 85, 92-93. This conduct was distinct from when he threatened to kill Sage if she attempted to leave and chop her up and place her in a garbage bag. RP at 83, 95. It was reasonable for the trial court to find that the assault with a deadly weapon and the harassment charges were same

[7] Of course, Tedder did not merely fail to raise the issue, but affirmatively agreed that the assault and harassment convictions were not same criminal conduct: "So we'd ask the Court to make a finding that the assault and the harassment are the same criminal conduct as the unlawful imprisonment. Um, not necessarily the same cond – not as to each other but as to the unlawful imprisonment. So, I'm not saying the assault and the harassment are the same criminal conduct." RP at 495. Ultimately, the court agreed with Tedder's argument in calculating the offender score. RP at 496-97, 499.

with the unlawful imprisonment as part of "one big scheme" with the purpose of keeping her in the house. However, assaulting Sage with a deadly weapon employed one method of keeping Sage prisoner, while threatening to kill her employed another. Thus, these crimes were distinct and were not same criminal conduct. This appears to have been obvious to the parties, as both Tedder and the State agreed these crimes were not same criminal conduct. Therefore, the trial court did not abuse its discretion when it agreed with the parties on this issue and sentenced accordingly.

D. Tedder waived the right to challenge his legal financial obligations by failing to object to their imposition at the time of sentencing.

Because Tedder did not object to his legal financial obligations ("LFOs") at the time of sentencing, he waived the right to challenge them for the first time on appeal. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Kuster*, 175 Wn.App. 420, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn.App. 150, 157, 248 P.3d 103 (2011)) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*,

174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP2.5(a), appellate courts can refuse to address an issue *sua sponte*. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). RAP 2.5(a) permits a party to raise issues for the first time on appeal for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. While Tedder cites RAP 2.5(a) generally, he fails to explain which of these exceptions apply. Because Tedder did not object to the imposition of his LFOs at sentencing, this issue was waived.

E. Because Tedder did not object to the jury instruction defining reasonable doubt, his claim is waived on appeal.

When Tedder did not object to the jury instruction defining reasonable doubt, he waived this issue for appeal. In 2007, the Washington Supreme Court instructed all Washington State trial courts as follows: "We also exercise our inherent supervisory power to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The trial court abided by this Supreme Court directive when it instructed the jury on the burden of proof

by using WPIC 4.01. Tedder did not object to this instruction being given. RP at 406. Because he did not object to the issue at trial he waived the issue.[8]

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999). When considering a jury instruction challenge, the appellate court reviews the instructions as a whole. *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). "Generally, an appellant cannot raise an issue relating to alleged jury instructions for the first time on appeal unless it is a 'manifest error affecting a constitutional right.'" *Id.* (citing RAP 2.5(a)). Jury instruction

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[8] Often when cases involve a jury instruction challenged on appeal, the invited error doctrine will apply: "[E]ven where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn.App. 75, 89, 107 P.3d 141 (2005). Because Tedder did not propose the jury instruction at issue, the invited error doctrine does not apply. *See State v. Corn*, 95 Wn.App. 41, 56, 975 P.2d 520 (1999). However, when the court addressed the jury instructions with the parties, Tedder neither objected nor took exception to the instruction. By permitting the jury instruction to go forward, Tedder achieved exactly what the invited error doctrine is intended to prevent: He did not raise the issue when given the opportunity at trial, then, after being convicted, he raised the issue for the first time on appeal in an attempt to obtain a new trial, denying the trial court the opportunity to address the issue at the appropriate time. *See State v. Schaler*, 169 Wn.2d 274, 303, 236 P.3d 858 (2010) (J.M. Johnson, J., *dissenting*).

errors are not automatically constitutional in magnitude. *Id.* (citing *State v. Scott*, 110 Wn.2d 682, 691, 757 P.2d 492 (1988)).

"Instructions satisfy the requirement of a fair trial when, taken as a whole they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (citing *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980)). "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court to correct them.[9] *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

In *Bennett*, the Supreme Court explained its approval of WPIC 4.01 because it allows both parties to argue their theory of the case. 161 Wn.2d at 317. The court also recognized the temptation to expand the definition "where creative defenses are raised." *Id.* But the court explained that an effort to improve or enhance the standard approved instruction "necessarily introduces new concepts, undefined terms and

[9] Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

shifts, perhaps ever so slightly, the emphasis of the instruction." *Id.* The court stated that: "[I]nnocence is simply too fundamental, too central to the core foundation of our justice system not to require adherence to a clear, simple, accepted and uniform instruction." *Id.* at 318. The court then concluded that sound judicial practice required WPIC 4.01 to be given and instructed all state trial courts to do so. *Id.* While the Supreme Court did not specifically address the issue Tedder raises with this instruction, it surely would not have mandated the use of this instruction if it was unconstitutional. Accordingly, giving the instruction would not amount to a manifest error affecting a constitutional right.

Here, Tedder's argument that the jury instruction defining the burden of proof itself shifted the burden of proof when it defined reasonable doubt as "one for which a reason exists" fails. The State does not disagree with Tedder's assertion that, "[t]he phrase 'a reason' indicates that reasonable doubt must be capable of explanation or justification." *Appellant's Brief* at 33. However, Tedder's argument that "being within the bounds of reason" is distinct from "being capable of explanation or justification" is flawed. *See Appellant's Brief* at 33. A proposition is only within the bounds of reason when it is capable of explanation or justification. Nothing about the jury instruction given required the jurors to articulate an explanation or justification. Further, the term "reasonable"

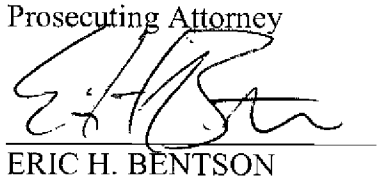
is an adjective for "doubt" and the jurors were tasked with determining whether the evidence was sufficient to prove the crime "beyond" a reasonable doubt. Thus, the reasonable doubt instruction did not require the jury to articulate a reason but merely to determine whether or not the evidence proved the charges beyond a reasonable doubt. To embrace Tedder's reasoning would require instructing the jury that beyond a reasonable doubt actually means beyond an "unexplainable doubt." This would be unreasonable. Because the Supreme Court has directed trial courts to give the WPIC 4.01 jury instruction, Tedder did not object to this instruction at trial, and he fails to show that giving this instruction was a manifest error affecting a constitutional right, his claim should not be considered on appeal.

V. CONCLUSION

For the above stated reasons, Tedder's convictions and sentence should be affirmed.

Respectfully submitted this 31st day of August,

RYAN P. JURVAKAINEN
Prosecuting Attorney

By: 

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 31st, 2015.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 31, 2015 - 4:07 PM

Transmittal Letter

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